IN THE

Supreme Court of the United States

October Term, 1975
No. 75-1128

PHOENIX NEWSPAPERS, INC., a corporation; and MICHAEL PADEV,

Appellants,

vs.

WADE CHURCH,

Appellee.

On Appeal From the Court of Appeals, State of Arizona, Division One, Department B.

APPELLANTS' REPLY TO MOTION TO DISMISS.

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SUBJECT INDEX

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Appellants' Objection to Misuse of Prior Decision.

Appellee has made liberal use throughout his "Motion to Dismiss or Affirm" of arguments, conclusions and assertions as found in the majority opinion of the Arizona Supreme Court in its 1968 opinion reversing the judgment entered upon the first trial of this action. (103 Ariz. 582, 447 P.2d 840.) Some have been culled from the opinion of the Court of Appeals; others from the reported decision. The justification offered is that in its opinion the Court of Appeals stated:

> "Inasmuch as the evidence during the second trial was in most respects substantially identical

to that introduced in the first trial, we will not attempt to set forth the *background facts* pertinent to the libel claim." (Emphasis added.)

From this unsupported and unfounded base, appellee engrafts upon the record here the various excerpts from the first decision as if supported by the record here.

The transcript of the evidence and exhibits received in evidence during the first trial and a part of the record in the Arizona Supreme Court *were not before the Court of Appeals and are not part of the record here*. The record in the Court of Appeals, as certified by the Clerk of that Court to this Court, is barren of even a smidgen of evidence which was introduced on the first appeal, identified as such.

That appellants disagreed with the first decision and opinion, as reflecting a fair reading of the proof offered on the first trial is evident from the fact they petitioned this Court for certiorari which petition, not surprisingly, was denied. (394 U.S. 959.)

As illustrative of the distortion which resulted through reading into this record excerpts from the majority opinion appellants point to the excerpt from appellee's "Counterstatement of the Case" (pp. 5, 6) which consists in major part of quotations from the 1968 decision as if it reflected the *evidence* in this record.

The record in this case is clear that neither Padev nor Pulliam had read or had access to the entire speech Church gave at Flagstaff [R.T. Vol. IV, p. 361] when the editorial was written and published from which the Arizona Supreme Court quoted at length and considered as supporting proof of "actual

malice". The question for decision must be resolved in the light of facts known to Padev and Pulliam when the editorial was written and published.

The bias which infected the 1968 Supreme Court decision is pointed up by its quoted excerpt from the Gazette news story (which is quoted in full in the Appendix to Appellants' Opening Brief in the Court of Appeals (p. 10, *et seq.*)), which unfairly implies that the speech reference to employing lobbyists was made in conjunction with the people's council recommendation. This is demonstrated by the physical arrangement of the quoted excerpt referring to employing lobbyists as if appearing as immediately following the "people's council" part of the speech. In fact it follows a suggestion that labor must undertake "a far more effective public relations program" at a place in the speech substantially isolated from the people's council recommendation. (Appendix p. 12.)

Appellants had the following matters before them when the editorial was written and published:

(a) Radio newscasts which referred to Church's proposal that labor establish a "people's council";

(b) An Arizona Republic News article which was headed "Church Flays Legislature's Third House" and (i) which reported Church advocated a people's council to offset the special interest "third house" which ruled Arizona from Hotel Adams; and (ii) that labor join with churches and similar groups to hire full-time personnel to match lobbyists of the so-called special interest groups;

(c) A Phoenix Gazette News article which was headed "Labor Urged to Combat Third House"

and which made no reference to labor joining with churches and others in employing full-time personnel but did report that Church urged the *creation* of a "people's counsel" to offset the effects of the "third house" of the legislature through which (he says) management dominates the law-making in Arizona.

This represents the factual information which inspired Padev to write the editorial except that Church by his repeated "savage" and "brutal" attacks upon the legislature, other public officials and banks, utilities and insurance companies, plus his early expressed admiration for "economic democracy in Russia because big capital doesn't control it", had caused Padev real concern as to Church's motives.

Appellee's "Jurisdiction".

Appellee would turn aside appellants' claim that the validity of Arizona Rules of Civil Procedure, 50(a) and 50(b), and A.R.S., Section 12-2102, as applied by the Arizona Courts, contravened the First and Fourteenth Amendments to the United States Constitution as explicated by the Court in *Times v. Sullivan,* (1964) 376 U.S. 254, 11 L.Ed.2d 286, 84 S.Ct. 710, and its progeny by asserting that the violation of appellants' constitutional rights, if found, merely violated "settled practice of the Arizona Courts." In support of its position, appellee makes reference to *Baltimore & P.R. Co. v. Hopkins,* 130 U.S. 210, 9 S.Ct. 503, 32 L.Ed. 908 (1889). The case is plainly not helpful.

Justice Fuller stated the claim asserted by the plaintiff in error, the *Baltimore & P.R. Co. v. Hopkins,*

supra, in justifying review by the United States Supreme Court as follows:

> ". . . and it was claimed on behalf of the defendant that it possessed and exercised authority by virtue of grants from the United States to do all that it did do in the premises, the validity of which authority, it is now insisted, was denied by the Court." (32 L.Ed. 909.)

The Court said:

". . .

"The case at bar does not involve the exercise of an authority under the United States, in the sense of an authority to act for the Government; but it is claimed that the railroad company acted under certain statutes of the United States authorizing such action, and that the validity of these statutes, or of authority under them, was denied.

". . .

". . . The validity of the statutes, and the validity of authority exercised under them, are, in this instance, one and the same thing; and 'the validity of a statute,' as these words are used in this Act of Congress, refers to the power of Congress to pass the particular statute at all, and not to mere judicial construction as contradistinguished from a denial of the legislative power. In our opinion the validity of no Act of Congress, or authority under the United States, was so drawn in question here as to give us jurisdiction, and therefore, as the amount of the judgment did not exceed five thousand dollars, . . ."

Appellee overlooks the function of Rules 50(a) and 50(b) of the Arizona Rules of Civil Procedure and the function of A.R.S., Section 12-2102.

While it is true that at common law a court of general jurisdiction had inherent authority, subject to certain limitations, to grant a new trial, 66 C.J.S., Sec. 115, p. 328,[1] exercise of that power by Arizona trial courts must be exercised pursuant to the requirements of the rule as established through the "settled practice" and as explicated by Arizona precedents. The trial court in granting or denying such motion "must be warranted by law and guided by established precedents."

Sharpensteen v. Sanguinetti, 33 Ariz. 110, 262 Pac. 609;

Rothman v. Rumbeck, 96 P.2d 755, 54 Ariz. 443;

Joy v. Raley, 540 P.2d 710, 24 Ariz.App. 584 (1975);

Southern Ariz. Freight Lines v. Jackson, 63 P.2d 193, 195, 48 Ariz. 509 (1937).

The Arizona cases therefore establish that Rules 50(a) and 50(b) confirm and also delimit this power and write into the power thus granted the requirement that the trial court must apply the rules as if there was set forth in the wording of the Rules as written the requirement, in effect: "In passing upon such motion the trial judge shall accept all tendered evidence favorable to the party against whom the motion is directed

[1]"The legislature may limit or restrict this power by providing "the specific instances in which a new trial may be granted." *Mann v. Superior Court,* 127 P.2d 970 (Cal.Ct.Appeals 1942); *Spruce v. Wellman,* 219 P.2d 472, 98 Cal.App. 158.

as true, shall draw all reasonable inferences in favor of such party and shall view the case in the light most favorable to such party.

Plainly the Court of Appeals, in its evaluation of the evidence as supporting acceptable proof of "actual malice" did not apply the required standards which this Court has stated explicitly and clearly in *Times* and the numerous decisions following *Times.*

The Court of Appeals ignored the undisputed fact that a serious communist infiltration was under way in this country during the period 1917-1919 utilizing the "people's council" device as the entry wedge and that Padev and Pulliam were well aware of this historical fact.

No mention is made by the Court of the fact Church had followed a communist line in his repeated attacks upon other officials, including the Arizona Legislature. That such was the case was not denied or disputed by Church nor did appellee offer any challenge to the testimony characterizing this line of action with communist practices.

All of this the Court of Appeals ignored.

Even if the argument of appellee to the effect that only a "settled practice" of the Arizona Courts is at stake, certainly the hurt to appellants' constitutional rights is equally severe whether the blow be administered by a state rule and statute or by a state court "settled practice."

If review by appeal is not supportable, then review by certiorari is required.

Appellee's Response to Question I.

Appellee's response to this question demonstrates that there is considerable uncertainty in the trial and appellate courts as to this federal question. Such a question cannot be deemed insubstantial since adherence to the commands of the First and Fourteenth Amendments as properly understood by trial and appellate judges in administering justice is at stake.

Appellee's Response to Question II.

Appellee relies upon the Court of Appeals' analysis of the evidence of "actual malice" bolstered by conclusions voiced by Justice Lockwood on the first appeal as demonstrating adequate proof of "actual malice" meeting *Times* standards. Appellee then concludes that it is inappropriate "to ask this Court to review the evidence *de novo* in view of the studied evaluation of the evidence by the Court below.

This Court has quite repeatedly emphasized that such a review is its obligation in cases such as this—an obligation for which these appellants are truly thankful.

The Court of Appeals found support for a finding of "actual malice" in:

1. The newspaper articles above discussed (ignoring the fact of radio newscast reports of the "people's council" recommendation);

2. Padev's admission that he did not think Church was a communist or communist sympathizer;

3. The "claimed admission" by Pulliam that he didn't believe Church was a communist;

4. The extensive knowledge which Padev had of communism.

With respect to the newspaper articles, a fair-minded reading of either does not lead to the conclusion that Church had reference to only lobbyists. When read together, the conclusion is clear that Church recommended "hiring" lobbyists and "creating people's councils."

Certainly this is true, when it is realized that the very phrase "people's councils" used in these circumstances is understood to indicate a communist infiltration technique, to an informed person.

Certainly one does not "create" lobbyists.

Certainly the "claimed admission" of Pulliam is no evidence at all. Pulliam said: [R.T. 292, 293]

> "I said as far as I know he isn't a communist. I don't know—how do I know what he is? Do you know what he is?" . . . "Nobody knows whether a man is a communist or not."

Finally the Court of Appeals (among other things) ignored Church's history of admiration for Russian communist practices; ignored his continued violent attacks upon banks, other public officials, financial institutions, and the Legislature; and ignored the fact that Padev knew communist infiltration is accomplished through use of so-called liberals or left-wingers who may act innocently.

So also the Court of Appeals ignored the established fact that the function of editorial writers and columnists is not that of reporting on statements and events, but of taking reported statements and events, at face value, and editorializing and commenting upon statements of newsworthy people.

Appellee's Response to Questions III and IV.

Inasmuch as appellee has limited his response to these two questions to a *pro forma* response embodying only quotations from the earlier appellate decision and from the decision by the Court of Appeals, appellant will rest upon its prior presentation in the jurisdictional statement.

The "Respondeat Superior" Question.

The Court said in *Times v. Sullivan,* 376 U.S. 254, 11 L.Ed.2d 286, 84 S.Ct. 710, 711:

> "Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false, *since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement.*" (Emphasis added.)

Pulliam's good faith confidence in Padev as an expert in communism and its practices was not impeached. Pulliam relied upon Padev's assurances that "people's council" in fact historically had referred to political intrigue having for its ultimate purpose seizure of political power.

Pulliam himself recalled the communist infiltration of the United States in the 1917-1920 era through formation of "people's councils".

Pulliam as President of Phoenix Newspapers and Publisher of the Arizona Republic and Phoenix Gazette

was convinced that the editorial should be published and he alone directed its publication.

If Phoenix Newspapers, Inc. can be held liable in this case despite the adequate inquiry made by its publisher to make sure the publication of the editorial was justified, it would seem that the First Amendment shield of free press and free speech has been badly dented.

No one has disputed Padev's knowledge of communism and its practices and technique.

No one has challenged his honesty as a reporter and columnist.

No one has advanced any reason why Padev *would intentionally misread* the newspaper accounts of the proposals Church made.

No one has challenged Pulliam's good faith in fully relying upon Padev's expertise particularly when it is bolstered by his own not inconsiderable knowledge of communism.

To conclude that under these circumstances Pulliam's good faith authorization of the publication of the editorial does not insulate the newspaper company from liability robs *Times* of much of its vitality.

If Phoenix Newspapers is liable, does Pulliam or his estate owe Phoenix Newspapers' indemnity for having authorized an unlawful publication?

Respectfully submitted,

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